



The Mining and Lands Commissioner In the matter of The CONSERVATION AUTHORITIES Act

AND IN THE MATTER OF

An appeal against the refusal to issue permission to place fill and construct two residential dwellings on part of Lot 1 in Concession VIII in the Township of Georgina in the Regional Municipality of York, shown as parts 2 and 3 on Plan 65R-2282.

B E T W E E N :

GEORGE KAPIT and ROBERT KAPIT

Appellants

- and -

SOUTH LAKE SIMCOE CONSERVATION
AUTHORITY

Respondent

H.S. Dorsey, for the appellants.
K.C. Hill, for the respondent.

The appellants appealed to the Minister of Natural Resources from the refusal of the respondent to grant permission to construct residential buildings on part of Lot 1 in Concession VIII in the Township of Georgina, shown as parts 2 and 3 on Reference Plan 65R-2282. By Ontario Regulation 364/82 the power and duty of hearing such appeals were assigned to the Mining and Lands Commissioner. The appeal was heard in Toronto on December 5, 1983.

The subject lands lie on the northerly limit of Ravenshoe Road, the road allowance between the Townships of East Gwillimbury and North Gwillimbury, as widened and measure approximately 136.62 feet by 141 feet. The subject lands are situate in the centre of a broad flood plain that has been mapped by Marshall, Macklin, Monaghan Limited for the respondent, which mapping has been filed and forms part of Regulation 179 of Revised Regulations of Ontario, 1980. The appellants called B. C. Leung, P.Eng., an engineer with Marshall, Macklin, Monaghan

Limited who had prepared the flood plain mapping and consequently there was little dispute as to the relevant facts respecting floods. The evidence indicates that the flooding condition was attributable to a dam at Baldwin which is approximately four kilometres downstream with the result that the flooding has a backwater effect with very low velocities. However, the elevation of the regional flood at the subject lands is 229.7 metres. The elevation of the subject lands 227.68 and 227.83 metres with the result that in a regional storm the subject lands would be subject to two metres of flooding. The report of Leung, filed as Tab 11 of Exhibit 4, shows that in the event of a one hundred year storm there would be .54 metres of flooding. The elevation of Ravenshoe Road as it crosses the flood plain is below the regional flood elevation and at the subject lands the road would be subject to 1.3 metres of flooding or approximately four feet. This condition extends for at least one-half kilometre on each side of the subject lands with the result that in a regional flood there would be no ingress to or egress from the subject lands. The intersection of Highway 48 and Ravenshoe Road which is some 600 metres westerly of the subject lands would be under water.

Leung was able to design a method of flood proofing the proposed buildings by suggesting very high foundations without openings and other protections. He indicated that the velocities were relatively slow and the risks of erosion to such buildings were slight. In his report he concluded,

We are, therefore, of the opinion that the construction of the residential units on Messrs. George and Robert Kapit's properties are feasible from an engineering point of view and would have minimal effect on adjacent properties.

It was patent that the conclusion of the engineer did not refer to matters of the position of occupants of the proposed buildings during a regional storm and when the tribunal put this question to the witness, the witness was unable to refer to any policy of any authority which recommended the placing of residential

construction in lands that were subject to over six feet of flooding in a regional storm.

Two basic issues are contained in this case. Firstly, the question arises as to the effect to be given to a series of steps taken by the appellants and their predecessors in title to have the two parts established as building lots. A second issue involved a legal question of whether the jurisdiction of the respondent extends to matters of safety of persons as contrasted with management of the land and the buildings thereon in respect of flooding.

With reference to the first issue, a predecessor of the appellants applied to the Land Division Committee of the Regional Municipality of York for a severance to create the two parts of the subject lands. This matter was dealt with in 1977 following a submission of the respondent that was filed as Exhibit 3. The decision of the Committee, filed as Tab 1 of Exhibit 4, recognized the concerns of the respondent and in the second paragraph on the second page of the decision it was stated,

...The South Lake Simcoe Conservation Authority advises that the owner's land lies within the fill and construction limits for the Township of Georgina and as such the site displays a potential hazard relating to flooding, drainage, water storage, erosion, etc. The Authority recommends that the owner describe and map by means of a preliminary engineering report, the extent of flooding which would occur on the site as a result of a Regional storm and prior to the initiation of any grading or construction prepare an engineering report acceptable to the Authority and the Ministry of Natural Resources describing the means whereby storm water will be conducted from the site and erosion and siltation and their effects contained both during and after construction. The Authority further recommends that some form of vegetative cover be maintained on the site prior to the initiation of any construction.

In 1980 the appellants acquired the subject lands at which time approval of the York Region Health Unit to install a septic tank and tile bed and of the Township of Georgina for an entrance had been obtained. The oral evidence indicated that although no applications for building permits had been issued oral assurance had been given by the Township officials that such could be forthcoming. Upon

formal application being made at a later date the applications were refused pending the requirement of permission of the respondent. In the interval in 1980 an application had been made to the Committee of Adjustments for a minor variation to the zoning by-law respecting the minimum lot area requirements. Apparently there was an exception provision in the general by-law respecting previously subdivided areas and the two subject parcels were overlooked.

The respondent refused the application for permission on the grounds that there was a potential for loss of life to the occupants and for damage to the structure itself, reduction of storage capacity and constriction of the flood flows and the issue of precedence. On the issue of precedence A.A. Timmins, the Regulations Officer, admitted that he had not received an application in which the numerous local consents had been obtained. This had reference to some one thousand applications. However, the tribunal is of the opinion that its responsibility is to look at the merits of the application apart from the action taken by other controlling bodies and should not be influenced by the fact that zoning and other local provisions can be complied with in constructing the buildings that are the subject of the application. The real implication in the view of this tribunal of the precedent argument is that what transpired in the past is not significant but what might transpire in the future is the relevant consideration in respect of matters of precedent and the evidence of the respondent indicated that there were within the area under the jurisdiction of the respondent other similar lots where refusals of permission have been made and where applications might be brought in the future. It is apparent from looking at Exhibit 2 that a significant number of such applications might be made along Ravenshoe Road.

Assuming that the proposal of Leung will meet concerns of safety to the buildings and assuming that the tribunal could discount the issues of loss of storage capacity and constriction due to the wide widths of the flood plain the tribunal is not aware of any policy of flood plain management that would permit the

construction of residential buildings in an area that is subject to two metres of flooding in a regional storm. The policy of the Province in respect of construction in the regional flood plain contemplates that authorities may adopt a policy of permitting construction in what is known as the flood fringe, namely, the area above the elevation of the one hundred year storm but the evidence indicates that the subject lands are within the flood plain of the one hundred year storm and this policy would not be applicable. The Provincial policy also requires that the buildings be flood proofed and access be provided. The latter cannot be provided in respect of the subject lands by reason of the depth of flooding over Ravenshoe Road even if sufficient fill were placed on the subject lands to provide access to that road. In the opinion of this tribunal the degree of flooding in a regional storm is so severe that the permission sought should be refused.

The second issue raised by counsel for the appellants was that the very matter discussed above and relied on by the respondent, namely, safety of persons, is not a proper matter for consideration. Reliance was made on the fact that the subject of consideration under section 4 of Regulation 179 is "control of flooding". It was submitted that this phrase does not include a consideration of the safety of occupants of buildings. Reference was made to the objects of a conservation authority contained in section 20 of the Conservation Authorities Act which reads,

20. The objects of an authority are to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals.

It was submitted that the objects of the conservation authority being limited to natural resources have no relation to the safety of persons and provisions for the safety of persons must be found in other statutes of the Province such as those dealing with the Ontario Building Code and municipal by-laws.

Counsel for the respondent argued that the key words in the objects section were the words "development and management" and

that these words are sufficiently broad to encompass a consideration of the conduct that is to be carried on in connection with natural resources and includes the consideration of the position of occupants as contrasted with buildings themselves.

At the outset the tribunal has some difficulty in relating the provision respecting objects of conservation authorities to the legislative jurisdiction of a conservation authority that flows from section 28 of the Conservation Authorities Act. In the view of this tribunal the phrase to be interpreted is the phrase found in the Regulation, namely, "control of flooding" and the issue to be determined is the legal meaning of that phrase as it is found in Regulation 179.

It may be noted at the outset that the phrase in the Regulation probably has the same meaning as it contains in clause 28(1)(f) respecting the scheduling of areas in which the placing of fill is prohibited or regulated. This tribunal in the past has dealt with this phrase and has pointed out that the addition of the words "control of" to the word "flooding" gives the phrase a broader meaning than if the phrase "prevention of flooding" had been used. In previous cases the interpretation had been made in connection with flood control programs and particularly in respect of the issue of the method of dealing with storage capacity which frequently in the individual case has a minimal effect but if every landowner was granted the same permission as the applicant was requesting there would be a significant exhaustion of the storage capacity. In the view of this tribunal the phrase is broad enough to encompass a concept of protection of people as well as protection of buildings and land from the ravages of flooding. The tribunal cannot accept the principle that the phrase and the area for consideration under the Regulation does not include a consideration of the safety of individuals who are exposed to floods. Early warning systems cannot operate without relation to individuals as contrasted with physical things and this tribunal in the past has considered steps taken in a fairly broad area of flood control programs in dealing with

applications. Accordingly, the tribunal is of the opinion that this issue cannot be resolved in favour of the appellants.

IT IS ORDERED that the appeal in this matter be and is hereby dismissed.

AND IT IS FURTHER ORDERED that no costs shall be payable by any of the parties to the appeal.

DATED this 4th day of January, 1964.

Original signed by G.H. Ferguson

MINING AND LANDS COMMISSIONER.